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March 22, 1996

EX PARTE OR LATE FILED

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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

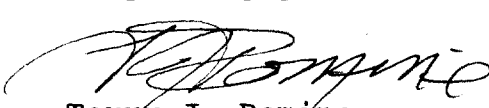
Re: Ex Parte Presentation - PCSD Corporation in the Matter of  
Implementation of Section 309(j) of the Communications Act  
- Competitive Bidding Narrowband PCS (PP Docket No. 93-253)  
and Amendment of the Commission's Rules to Establish New  
Narrowband Personal Communications Services (GEN Docket No.  
90-314; ET Docket No. 92-100)

Dear Mr. Caton:

Pursuant to Section 1.1206(a)(1) of the Commission's rules,  
enclosed herewith are two copies of a letter dated March 22, 1996 to  
the Chief, Wireless Telecommunications Bureau, in connection with the  
above-referenced matter.

Kindly contact the undersigned, should the Commission have any  
questions in regard to this matter.

Very truly yours,

  
Terry J. Romine

Enclosures

Two copies rec'd  
DATE 03/22/96

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WRITER'S DIRECT DIAL

March 22, 1996

EX PARTE OR LATE FILED

Michele Farquhar, Chief  
Wireless Telecommunications Bureau  
2025 M Street, NW, Room 5002  
Washington, DC 20554

Re: Ex Parte Presentation - PCSD Corporation in the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding Narrowband PCS (PP Docket No. 93-253) and Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services (GEN Docket No. 90-314; ET Docket No. 92-100)

Dear Ms. Farquhar:

PCSD Corporation ("PCSD" or "Company") respectfully submits this ex parte presentation in connection with the Further Notice of Proposed Rulemaking ("Further Notice") in the above-referenced proceeding. PCSD holds authorizations for five regional 50/50 kHz paired channels in the narrowband Personal Communications Services ("PCS") and received certain financing benefits as a qualified minority/woman-owned small business. See 47 C.F.R. Section 24.309(b)(1) and (b)(2). PCSD previously filed comments in this proceeding.

PCSD makes this presentation to clarify the impact on PCSD's Designated Entity Status should the Commission modify the definition of Designated Entities which are eligible for financial preferences in the remaining narrowband PCS auctions. Additionally, it wishes to reiterate its opposition to (a) modifying the two channels allocated for Basic Trading Area ("BTA") licensing to regional licensing and (b) the creation of entrepreneurs' blocks or Designated Entity set asides of any type for licensing the remaining narrowband PCS channels.

### Impact on PCSD's Status

PCSD qualified under the Commission's narrowband PCS rules as a minority/woman owned, small business which resulted in its being able to apply bidding credits in amount of 40% against its aggregate winning bids for Channel 13 in the five regions based on its eligibility as a minority/woman owned business. However, as discussed below, no actual financial benefit accrued to PCSD because, after application of the credit, the price paid for its licenses was equal to or more than the larger companies paid for equivalent narrowband PCS licenses. Additionally, it is paying 90% of the aggregate winning bids over a period of 10 years by quarterly installments and interest only payments for two years based on its status as a small business.

In June 1995, the U.S. Supreme Court rendered its opinion in Adarand Constructors, Inc. v. Peña, and for the first time imposed a strict standard of review on federal affirmative action programs, such as providing preferences in competitive bidding rules for minority-owned businesses. In rulemaking proceedings involving implementation of a competitive bidding processing adopted after the Adarand decision<sup>1</sup>, the Commission has eliminated any preference afforded Designated Entities defined as a minority/woman-owned business and provided preferences only to Designated Entities meeting the small business definition. In all cases, the Commission found that its definition of small businesses encompassed the minority/woman-owned businesses it was intending to benefit by the favorable financial preferences. Consequently, the narrowband PCS service currently is the only service in which minority/woman-owned businesses are defined as a Designated Entity and are entitled to certain financial preferences. PCSD anticipates that the Commission will follow its prior practice and amend the Designated Entity rules affecting the licensing of MTA/BTA narrowband PCS channels to provide financial preferences only to small businesses.

PCSD supports such an action and requests clarification that such changes will be applicable to those entities which acquired narrowband PCS regional licenses as Designated Entities. PCSD and the two other Designated Entity narrowband PCS regional licensees would be placed at a competitive disadvantage in the MTA/BTA bidding process, should they be required to continue to meet requirements of both a minority/women owned business and a small business.

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<sup>1</sup> See Sixth Report and Order (FCC 95-301), 10 FCC Rcd \_\_\_\_ (1995) (broadband PCS C Block); Second Report on Reconsideration and Seventh Report and Order (FCC 95-395), 10 FCC RCD \_\_\_\_ (1995) (900 MHz Specialized Mobile Radio ("SMR") service); First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making (FCC 95-501), 10 FCC Rcd \_\_\_\_ (1995) (800 MHz SMR service).

In practice, the restrictive definition of minority/woman-owned businesses in the narrowband PCS rules erects the same barrier to the entry of these entities into the industry which Congress and the Commission sought to eradicate. The narrowband PCS rules define a minority/woman-owned business as one in which the control group of such entity is composed 100% of members of minority groups and/or women who are U.S. citizens. There are a number of businesses which are controlled by members of minority groups, but are not 100% owned by such members. Typically, these minority-controlled businesses meet the criteria as a small business. However, these businesses are not able to invest in PCSD as active participants of the Company because the minority-owned status of the Company would not be maintained and could result in unjust enrichment penalties being imposed.

Further, PCSD maintains that the unjust enrichment provisions as they pertain to repayment of bidding credits are no longer applicable in connection with the award of narrowband PCS regional licenses. The Commission when it adopted such provisions envisioned that affording Designated Entities bidding credits would result in such entities obtaining licenses at a value below the fair market value. In fact, PCSD paid more for its "nationwide" licenses, after application of the credits, than those larger, entrenched telecommunications companies paid for their nationwide licenses (\$91,000,000.00 vs. \$80,000,000.00). Additionally, PageMart II, Inc., a non-Designated Entity which also acquired all 5 regional licenses for the other 50/50 kHz channel, paid approximately \$91,000,000 (including penalties). The bidding credits, therefore, allowed Designated Entities to acquire the licenses, but they were still required to pay fair market value for such licenses.

Should the Commission amend the rules to provide maximum bidding credits and the most favorable installment payment provisions<sup>2</sup> solely to small businesses, PCSD requests that the amendments apply retroactively to narrowband PCS regional Designated Entity licensees. Otherwise, the Commission has created two classes of licensees in the narrowband PCS service and is affording the "new" class a competitive advantage over the "old" class.

#### Retain BTA Licensing

In its Comments elicited by Public Notice dated December 21, 1995, PCSD objected to the redesignation of the two channels from a BTA licensing basis to a regional licensing basis. The Commission proposed this redesignation in connection with its proposal in the Further Notice to create an entrepreneurs' block. The Commission stated that "there are companies that would be eligible for an

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<sup>2</sup> PCSD reiterates its position that the Commission should amend the narrowband PCS rules governing installment payments to allow interest-only payments for six years rather than two years, similar to the broadband PCS rules.

entrepreneurs' block license that may desire larger license areas than MTAs and BTAs. Further Notice at p. 54, ¶ 35.

PCSD, like many other parties to this proceeding,<sup>3</sup> opposed such redesignation. In adopting a BTA service area for some channels, 2 of the 26 available channels, the Commission stated that

[P]roviding channels at the local level [footnote omitted], we will foster broader participation in narrowband PCS, allow entry by smaller firms and businesses, increase competition and promote diversity in the provision of narrowband PCS services.<sup>4</sup>

The Commission's adoption of the BTA licensing was attacked by PageNet. Nevertheless, contrary to the arguments to eliminate BTA licensing made by PageNet, which were supported by two other paging companies, the Commission preserved the designation of two channels for licensing on a BTA basis.<sup>5</sup>

PCSD agrees with the Commission's rationale that the availability of narrowband PCS channels on a BTA basis is in the public interest because it permits entry by small businesses into this new wireless telecommunications service whereas such businesses may be unable to acquire licenses the channels if offered on a wider geographical area. The capital expenditures necessary to acquire a BTA license and construct the underlying system is significantly less than required for a regional and/or MTA license. Thus, more small businesses may be better able to obtain sufficient financing to implement narrowband PCS BTA system than if this option is abolished. With the opportunity for more businesses to acquire licenses, Congress' and the Commission's objectives to promote diversification in the entities that hold FCC licenses will be met. Eliminating these smaller geographical area licenses would destroy such opportunities.

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<sup>3</sup> See Comments filed in Response to Public Notice Dated December 21, 1994 seeking additional comments of proposed Narrowband PCS Entrepreneurs' Block ("Additional Comment Request") by AirTouch Paging; Mobile Telecommunications Technologies Corp.(M-Tel); PageMart, Inc.; and Personal Communications Industry Association. See also Reply Comments to the Additional Comment Request by PageMart, Inc. and M-Tel.

<sup>4</sup> First Report and Order (FCC 93-329), Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, 8 FCC Rcd 7162 (1993).

<sup>5</sup> See Memorandum Opinion and Order (FCC 94-30), 9 FCC Rcd 1309 (1994).

Nor does PCSD believe that such entities would be able to form consortiums with other parties which might want these localized systems should the Commission license the two channels on a larger geographical basis. Creating such consortium takes time and requires some degree of knowledge of persons which may wish to participate. Such burdens would reduce the number of small business participants in the upcoming narrowband PCS auction rather than encouraging participation.

Moreover, the public interest is served by a large number of entities participating in an auction because the amount of revenue generated increases. PCSD recognizes that the generation of revenue is not the primary goal of the Commission in using auctions as a licensing method. Nevertheless, the Commission may take such factor into consideration in determining the manner in which the auction will be conducted. The Commission's auction experience reflects that similar channel bandwidth auctioned on a smaller geographical area generates more revenue than such channels auctioned on a larger geographical area. For example, the Commission auctioned the broadband PCS 30 MHz Block A and B on an Metropolitan Trading Area ("MTA") basis which resulted in an aggregate revenue of \$7.7 billion. The ongoing 30 MHz Block C auction on a BTA basis has already raised \$8.6 billion.

Additionally, the Commission should be extremely cautious in modifying long standing rules which result in small businesses being required to alter their business plans. For example, the rules for participating in the C Block auction were modified a number of times. These constant modifications made it difficult, if not impossible, for small businesses to obtain capital because assurances as to the requirements that investors would be required to meet could not be made. Business plans have been formulated on the Commission's rules that provide for various opportunities to engage in the narrowband PCS business. Analysis of expected competition and the viability of businesses have been completed and capital raised based on these factors. The Commission's amendment of its rules at this late date may adversely affect potential new participants to the narrowband PCS auctions.

Finally, the Commission should recognize that entities which already hold narrowband PCS spectrum are better able to optimize the use of the spectrum with the availability of differing geographical areas. As the Commission is aware, there may be various population pockets which require greater capacity and addition spectrum need. Paging Network of Virginia, Inc. acquired three nationwide narrowband PCS licenses and PageMart II, Inc. acquired a nationwide license in addition to its 5 regional narrowband PCS licenses. These companies, therefore, have a tremendous edge over Designated Entity licensees which were unable to effectively compete for nationwide spectrum with these companies.<sup>6</sup>

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<sup>6</sup> The Commission acknowledged that it did not provide sufficient financial benefits to the Designated Entity in the nationwide narrowband PCS auctions. It,

For start-up companies such as PCSD to compete in the major metropolitan markets with these larger companies, it will need to acquire additional spectrum. However, a regional licensee such as PCSD may only require additional capacity on a BTA basis. Even though PCSD may acquire an additional regional license to ensure such capacity requirements, the spectrum may lie fallow in some areas because it is not economically feasible to construct infrastructure. Additionally, the cost of having to acquire a license for a larger geographic area than needed also decreases the ability of the smaller business to remain competitive on pricing with the larger, incumbent companies. PCSD, therefore, urges the Commission to retain the BTA licensing to permit more efficient use of the narrowband PCS spectrum and more competition within all markets.<sup>7</sup>

#### No Entrepreneurs' Block

PCSD remains opposed to the creation of entrepreneurs' block in narrowband PCS and urges the Commission to modify its rules to permit Designated Entities to apply bidding credits for which they may be eligible to any channel being auctioned. The creation of entrepreneurs' blocks and/or the designation of only a limited number of channels to which financial preferences may be applied are contrary to Congress' and the Commission's intent to promote diversification of licensees and encourage the creation of new businesses.

The Commission, by channelling small businesses to a limited number of channels, affords larger telecommunications companies an opportunity to acquire more spectrum with substantially less competition. PCSD asserts that the Commission should structure the remaining narrowband PCS rules similar to those adopted in the 900 MHz SMR rules. The 900 MHz SMR licenses are being auctioned on an MTA basis with .25 MHz blocks of spectrum. The Commission's rules permit small businesses to apply the financial preferences to which they may be eligible to any of

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therefore, increased the amount of bidding credits available to Designated Entities for the regional narrowband PCS auctions to equalize the bidding positions of the Designated Entities and the larger firm and incumbent paging companies. See Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making (FCC 94-219), PP Docket No. 93-253; GEN Docket No. 90-314; ET Docket No. 92-100, ¶ 4, 9 FCC Rcd \_\_ (1994).

<sup>7</sup> Should the Commission determine that BTAs are not an appropriate geographic area for licensing, PCSD requests the Commission consider redesignation of the two channels for licensing on an MTA basis rather than a regional basis. For the same reasons as set forth above, an MTA basis would permit a greater number of small businesses to participate and would permit greater competition in the narrowband PCS industry.

increased the revenues derived from the auction. PCSD, therefore, urges the Commission to permit small businesses the greatest opportunity to acquire narrowband PCS licenses by permitting both bidding credits and installment payments to be applied to all remaining channels to be auctioned.

#### Conclusion

The Commission has been extremely responsive to changing circumstances which might effect the competitive bidding processes. Over the past few years, the Commission has modified its rules to ensure that its goals of diversification and promoting the entry of small businesses are met. PCSD, therefore, encourages the Commission to continue its outstanding work in this area and take action on the pending Further Notice in a manner consistent with this presentation.

Respectfully submitted,

**PCS DEVELOPMENT CORPORATION**

By: \_\_\_\_\_

Gerald S. McGowan

Terry J. Romine

Its Attorneys